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No. 82-374

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT FLANAGAN,
JAMES KEWESHAN,
JOSEPH LANDIS,
THOMAS McNAMEE,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

Of Counsel:
SPRAGUE & RUBENSTONE
Suite 400, Wellington Building
135 South 19th Street
Philadelphia, PA 19103
(215) 561-7681

RICHARD A. SPRAGUE
BRUCE L. THALL
Suite 400, Wellington Building
135 South 19th Street
Philadelphia, PA 19103
Counsel for Petitioners Flanagan, Keweshan, Landis and McNamee

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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PETITIONER'S REPLY BRIEF

In its Brief, the United States has affirmatively represented that "we do not oppose the grant of the instant petition for a writ of certiorari." (Gov. Brf. at 7). The government referred to two categories of issues, each of which it deemed so significant as to warrant the granting of the petition.

1. Although the court below held that it had jurisdiction over the appeals from the district court orders disqualifying counsel pursuant to 28 U. S. C. § 1291 and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) (Pet. App. A5 n. 1), and the government acknowledged that "other courts of appeals have reached the same conclusion, in criminal cases" (Gov. Brf. at 8), the government points to a conflict in the circuits based upon *United States v. Greger*, 657 F. 2d 1109 (9th Cir. 1981), petition for cert. pending, no. 81-1357.[1]

2. Obviously, since the Third Circuit held that it had jurisdiction over the merits of the appeal, petitioners did not raise this question in their Petition. Even though *Greger* is distinguishable because the instant case presents a judicially acknowledged waiver and no actual conflict of interest, petitioners agree with the government that "the circuit conflict on this issue independently warrants review by this Court." (Gov. Brf. at 8).

3. The second category of issues deemed so significant by the government as to warrant the granting of the Petition deals with the merits of the disqualification issue.

1. *Greger*, cited in the Petition for Certiorari, poses the question whether a pretrial disqualification of counsel in a criminal case who has an actual conflict of interest, absent a waiver or common defense, is a final appealable order.

The government acknowledges that the Third Circuit stands alone in holding that despite a valid waiver and an absence of an actual conflict of interest, nonetheless, disqualification of counsel chosen by defendants to present a common defense is permissible (Gov. Brf. at 11-12). Indeed, the government concedes that the holding below is flatly contradicted by *United States v. Curcio*, 680 F. 2d 881 (2d Cir. 1982); *United States v. Cunningham*, 672 F. 2d 1064 (2d Cir. 1980); *United States v. Armedo-Sarmiento*, 524 F. 2d 591 (2d Cir. 1975); *United States v. Garcia*, 517 F. 2d 272 (5th Cir. 1975); *United States v. Agosto*, 675 F. 2d 965 (8th Cir.), *cert. denied* after remand and subsequent affirmance sub nom. *Gustafson v. United States*, No. 81-2270 (Oct. 4, 1982).

Petitioners agree with the government that "review by this Court is required in order to offer guidance on the question" (Gov. Brf. at 12).

4. Petitioners, nonetheless, are compelled to further reply to the government's brief because it has misstated the factual underpinnings of the disqualification issue, especially regarding the absence of an actual conflict of interest and the spectre of potential conflicts attributable to joint representation.

5. Petitioners have continuously and studiously established that there is no conflict of interest (A41, A45). The government had never contended the contrary (A37). The trial court found no such conflict (A4-A6). The orders appealed from are based solely upon the trial court's assessment that a conflict of interest was likely to arise (A16, A4, A3).

6. After the trial court issued its Order precluding petitioners from retaining counsel of their choice, based on its belief that potential conflicts might rise to the level of actual conflicts, petitioners filed a Motion for Recon-

sideration and/or Clarification to assure that the basis for the court's order was clear. The Motion was granted, and the court clearly set forth the core predicate for its disqualification—"the presumption that privileged information has been acquired as a result of the attorney-client relationship." (A30). Indeed, both the panel and the district court articulated that the potential conflict causing them the most concern was that occasioned by counsel's acquisition of privileged information by dint of the lawyer/client relationship.

7. The major section of petitioners' appellate brief discussed the facts that whether petitioners are represented by one firm or separate firms:

> (a) any privileged information shared among counsel raises the self-same potential conflict; and
>
> (b) the price paid for sharing privileged information is the waiver of the attorney/client privilege respecting that information shuold be the common defense breakdown.[2]

It necessarily follows, therefore, that the panel opinion serves to preclude the presentation of a common defense because such defense necessarily hinges upon the complete sharing of privileged communications made to counsel, regardless of the number of firms representing co-defendants. Thus, while couched in terms of multiple representation, the panel opinion actually precludes the

2. This latter point was seemingly accepted by the panel which set forth in a footnote, "6. *See, e.g., In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381 (S. D. N. Y. 1975) (attorney-client privilege will not apply among joint defendants and their attorneys in later controversies between or among those clients, even though shared information may initially be insulated from exposure beyond confines of the group)." A10. The former point was not discussed by the panel.

presentation of a common defense, relying upon a procedural rule to abrogate the strategy constitutionally accepted by this Court.

8. It is this potential conflict, and only this potential conflict, which adheres to any criminal action in which the defendants choose to have a common defense presented by one law firm. The other potential conflicts discussed—opening and closing statements, sentencing, spillovers, possible grants of immunity, nature of the evidence, right to testify, character and reputation testimony (A14-A15, A42-A45)—are potential conflicts attributable solely to the determination by each petitioner to present a common defense. Regardless of whether one firm or four firms represent petitioners, these potential conflicts are present and to the same degree.

9. Thus, the government's assertion that: "the district court's finding—which was affirmed by the court of appeals (Pet. App. A10) and is not challenged by petitioners—that a conflict of interest would be 'very likely' to arise if petitioners were represented by the same law firm" (Gov. Brf. at 10) is somewhat misleading.

Petitioners have contended that a decision to present a common defense always raises the spectre of potential conflicts of interest. However, it is petitioners' position that this potential for conflict, unchallenged and undisputed, has no bearing whatsoever on the issue of joint or multiple representation.

10. Petitioners have strenuously and repeatedly contested the notion that a potential conflict of interest arising from "the presumption that privileged information has been acquired as a result of the attorney-client relationship" (A30) may serve to disqualify counsel from presenting a common defense for persons jointly represented.

To the extent that the government's brief may be read to suggest that this finding by the courts below is undisputed and unchallenged, such suggestion is erroneous.

11. Having clarified the record, petitioners agree with the government that this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

RICHARD A. SPRAGUE
BRUCE L. THALL
SPRAGUE & RUBENSTONE
Counsel for Petitioners
Flanagan, Keweshan,
Landis and McNamee

Dated:

Of Counsel:
SPRAGUE & RUBENSTONE
Suite 400, Wellington Bldg.
135 South 19th Steet
Philadelphia, Pa. 19103
(215) 561-7681